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U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 03 121 52805 Office: VERMONT SERVICE CENTER Date: SEP 21 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks to employ the beneficiary as the director of learning at the Penobscot Job Corps Center, Bangor, Maine. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the beneficiary qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

We note that the Form I-140 petition identifies the alien beneficiary as the petitioner. Based on this designation, both the director and the AAO have previously referred to the beneficiary as the petitioner. The beneficiary, however, did not sign Form I-140 and therefore he cannot be considered to be the petitioner. The individual who signed the Form I-140 was Dr. [redacted]

We further note that some documents in the record identify Dr. [redacted] as a vice president of the Penobscot Job Corps Center; other materials identify her as a vice president of Training and Development Corporation. The Job Corps is a program administered by the Employment and Training Administration of the United States Department of Labor; Training and Development Corporation is a private corporation under contract to the Department of Labor to operate the center in Penobscot. We conclude that Dr. [redacted] is an official of Training and Development Corporation rather than the Department of Labor or the Job Corps, and therefore we consider the petitioner to be Training and Development Corporation. An official of that company, and not the beneficiary, has (by signing the Form I-140) assumed legal responsibility for the accuracy and truthfulness of the materials and claims submitted in support of the petition. Because the same attorney represents both the beneficiary and the employer, prior erroneous references to the beneficiary as the petitioner do not appear to have prejudiced the handling of the proceeding; the attorney of record has received all pertinent correspondence.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Information on the I-140 petition form indicates that the beneficiary has been offered a permanent, full-time position as director of learning at Penobscot Job Corps Center. The record contains nothing from officials of the Job Corps or the Department of Labor Education and Training Administration to verify the terms or duration of employment. The "Letter of Appointment," naming the beneficiary to the above position, was issued not by the Job Corps but by the petitioner (signed by [redacted] president and CEO of the petitioning company). The letter, dated September 5, 2002, does not specify the terms of employment.

The letter contains a copy of a second letter, also issued to the beneficiary by the petitioner on the same day, September 5, 2002, signed by [redacted], the petitioner's human resources manager. This letter reads, in pertinent part: "It is my pleasure to confirm our verbal offer of a paid internship for your Curriculum Practical Training Program effective September 5, 2002. This internship is scheduled to end on August 15, 2003. During this internship your title will be Director of Learning."

The letter from Ms. [redacted] indicates that the beneficiary's position is not permanent, as indicated on Form I-140, but rather part of an "internship," lasting less than one year, in connection with "Curriculum Practical Training." As of September 2002, the beneficiary was a graduate student at the University of Michigan. Nothing in the official job offer documentation indicates that the beneficiary would remain at the Penobscot Job Corps Center, or at the petitioning company contracted to operate that center, after August 2003 or after the beneficiary completed his graduate studies.

Dr. [redacted] identified above, states: "The position [the beneficiary] is currently filling at the Penobscot Job Corps Center has been vacant for some time, in part because of the innovations that [the petitioning company] brings to its work. Few educators have the broad range of skills that [the beneficiary] brings to the position." It remains that the beneficiary filled this position as part of a temporary student internship with a fixed ending date.

Dr. [redacted] continues:

> [The beneficiary] is spearheading the development of a series of training sessions for Job Corps staff in the area of teaching challenging students. He is responsible for building training programs in these areas for staff from the Loring and Penobscot Job Corps Centers. . . . This work will impact over 1,100 students yearly, from across New England. . . .
>
> Nationally, Job Corps serves over 40,000 students a year. These students will ultimately benefit from the innovations currently being developed under [the beneficiary's] leadership.

Mr. [redacted] also identified above, states that the beneficiary is "critical" in the petitioner's five-year plan to implement "a full-production learning system in our Job Corps Centers. . . . We expect him to take a leadership role in the organizational initiative to insure technological fluency in student and staff." The officials of the petitioning entity do not establish that the beneficiary's work has a demonstrably national (rather than local or regional) scope, nor do they persuasively explain why a national interest waiver is warranted. They appear to argue, in essence, that the position is an important one, and therefore the beneficiary should get a waiver in order to fill that position. This argument seems to presume a blanket waiver for the position in question.

The petitioner submits copies of two agricultural textbooks published in Zimbabwe. The beneficiary is one of three credited authors of *Focus on Agriculture, Book 3*. *Focus on Agriculture, Book 4* is credited solely to "P.G.D. Chard," but the beneficiary is named as the "Consultant Editor." These books shows that the beneficiary has put to practical use his master's degree in agriculture and education, but writing and editing textbooks is not *prima facie* evidence of eligibility for a national interest waiver.

The director denied the petition, stating "it is not sufficient for the [petitioner] to simply enumerate the alien's qualifications. The record does not demonstrate that other individuals could not also similarly achieve and duplicate the beneficiary's accomplishments and obtaining [sic] the same or similar results." The director also indicated that the petitioner has not shown that the beneficiary's past accomplishments distinguish him from others trained in his field.

On appeal, the petitioner submits a copy of the job description for the position of director of learning at Penobscot Job Corps Center, and statements from counsel and Dr. Kralovec. The job description is not dispositive. The fact that the alien is qualified for the job does not warrant a waiver of the job offer/labor certification requirement. *Matter of New York State Dept. of Transportation* at 221.

Counsel states: "The NYDOT decision gives only vague guidance regarding . . . how the national interest would be adversely affected if a labor certification were required for the alien." Because aliens in a broad variety of fields could conceivably qualify for the waiver, and because the statute and regulations contain no guidance at all in this regard, it would have been very difficult, if not impossible, for *Matter of New York State Dept. of Transportation* to include highly specific guidance that would apply to more than a very narrow band of potential waiver applicants.

Counsel then states: "As noted in the record, there do not appear to be any available U.S. workers having the minimum qualifications." The function of the labor certification process is to test exactly that claim (an absence of qualified U.S. workers). Considering that the unavailability of qualified U.S. workers would typically be a favorable factor in an application for labor certification, counsel does not explain why that factor should be grounds for a waiver.

The letter from Dr. Kralovec was originally written in support of an H-1B nonimmigrant visa petition (receipt number EAC 04 084 50793) filed by the petitioner on the beneficiary's behalf in early 2004. In this letter, Dr. Kralovec states: "Strong recruitment efforts have not been successful in trying to fill this position that [the beneficiary] is currently filling as an intern. . . . We propose to employ [the beneficiary] for a temporary period of three years, commencing 1 March 2004." The nonimmigrant visa petition for which Dr. [redacted] wrote this letter was approved, thus affording the beneficiary the opportunity to continue working for the petitioner. The filing of a labor certification would not inherently interrupt this already-authorized employment; the beneficiary could work throughout the three-year period of the visa while the labor certification is pending. Counsel states that labor certification is an "unnecessary barrier," but if counsel is correct that the petitioner "has simply found no one who can meet the stringent requirements of this position," then a labor certification would appear to be obtainable, without having to meet an additional burden of proof relating to the national interest waiver. In this light, the petitioner has essentially exchanged one "barrier" for another; if the petitioner were to apply for a labor certification, based on its asserted inability to locate a qualified worker, then the petitioner would not need to present an additional "national interest" argument.

Counsel asserts that the beneficiary "has an impressive educational background" and "will be able to bring much more to the field of education" than a minimally qualified worker, and that the beneficiary "is one of the best and brightest in the field of vocational education," but the record does not objectively support this claim. Counsel makes several unsubstantiated assertions about the beneficiary's achievements in Zimbabwe, but the assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The director having previously stated that it cannot suffice simply to list the beneficiary's accomplishments, counsel cannot overcome this by listing the beneficiary's accomplishments. The record also does not show that the vocational training field in the United States is similar enough to the one in Zimbabwe to allow meaningful predictions about the beneficiary's potential impact in the United States. The record does not show that the beneficiary has had, or is likely to have, a significant impact on vocational training in the United States outside of two Job Corps centers in New England.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.